IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 505

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Petitioners,

vs.

CHARLES ARMBRECHT and GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of JULES S. BACHE, deceased,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

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BRIEF FOR RESPONDENTS

Opinions Below.

The opinion of the United States District Court for the Southern District of New York (R. 99) was rendered on November 1, 1944 and has no official citation. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 113) was rendered on July 13, 1945 and is reported in 150 Fed. 2d 829.

Jurisdiction

The judgment herein was entered on July 13, 1945 (R. 122). No petition for rehearing was filed. The petition for a writ of certiorari was filed on October 12, 1945. Certiorari was granted November 19, 1945. The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, 28 U. S. C., paragraph 347(a), as amended by the Act of February 13, 1925.

Questions Presented

1. Did the Circuit Court of Appeals for the Second Circuit err in its conclusion that, in the adjudication of private rights federally created, a Federal court in equity is bound by the state ten-year statute of limitations which would be applied if the present question were presented to a New York State court?

2. Assuming that the doctrine of laches is pertinent, should not the district court have found that the petitioners were guilty of laches?

Statement

Error in petitioners' brief in their Statement of the Case in respect of facts stated to have been found by the district court and the omission of pertinent facts from such Statement, as well as the erroneous assumption in the briefs filed amici curiae on behalf of the Trustees of Central States Electric Corporation and the United States that the respondents were found guilty of inequitable conduct, impels a further statement here.

The cause of action herein accrued May 2, 1932. The district court in its first finding of fact found that

> "1. Plaintiffs were, on the second day of May, 1932, and still are creditors of the Southern Minnesota Joint

Stock Land Bank of Minneapolis which was closed on that day and was insolvent with an excess of liabilities over assets greater than $3,000,000—more than the par value of all the issued stock." (R. 100) [1]

The above finding is in accord with the findings of fact and conclusions of law in the original action against the stockholders of the Bank brought in July, 1932 by these same petitioners in the United States District Court, District of Minnesota. There the district court found as a fact that on May 2, 1932, the Southern Minnesota Joint Stock Land Bank of Minneapolis was and since that date had been and, at the date of the finding, still was insolvent with the amount of its outstanding contracts, debts and engagements on May 2, 1932, exceeding the fair value and market value of its assets by more than $3,000,000.[2] Said district court also found as a conclusion of law that each stockholder of said Bank was on May 2, 1932 and thereafter liable to the creditors of the Bank in the amount of the par value of the shares of stock so held by him.[3]

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[1] The par value of the outstanding capital stock of the Bank was $3,000,000 (R. 7).

[2] *Holmberg et al.* v. *Southern Minnesota Joint Stock Land Bank of Minneapolis et al.*, 10 Fed. Supp. 795. The finding is as follows: "X. That on May 2, 1932, defendant Southern Minnesota Joint Stock Land Bank of Minneapolis was, and at all times since has been, and now is, insolvent and unable to meet its obligations; that the amount of its outstanding contracts, debts and engagements on May 2, 1932, exceeded the fair value and market value of its assets by more than $3,000,000; and that said deficit has constantly and steadily increased since May 2, 1932, and is still constantly increasing" (p. 797).

[3] This conclusion of law is as follows: "1. That each stockholder of the defendant Southern Minnesota Joint Stock Land Bank of Minneapolis was on May 2, 1932, and at all times since, and is at the present time, liable to the creditors of the defendant Southern Minnesota Joint Stock Land Bank of Minneapolis in the amount of the par value of the shares of stock so held by him in said defendant Southern Minnesota Joint Stock Land Bank of Minneapolis; that an assessment should be made, declared and levied upon and against each and every such person in the amount of 100% of the stock so held by each stockholder" (Id., p. 798).

In *Holmberg* v. *Anchell*, 24 Fed. Supp. 594 at 601, the late United States District Judge John Munro Woolsey held in respect of the cause of action of these petitioners that "the cause of action accrued and the plaintiffs must be deemed to have been aware of their right to sue stockholders at least by July 28, 1932, when they began their suit in Minnesota."

The record shows a definite lack of diligence on the part of the petitioners. Respondent Charles Armbrecht since 1905 has resided continuously in the Bronx, City of New York (R. 77). After his retirement, about 1933, he was a weekly visitor to the office of J. S. Bache & Co. (R. 70-71; Finding of Fact 1, R. 100). It is not claimed that he ever concealed his whereabouts or attempted to avoid service of process.[4] Yet for more than four years—from August, 1937 to December, 1941 or January, 1942—petitioners did absolutely nothing to enforce his liability (R. 52). Petitioners admittedly knew from the Bank's records that Armbrecht's address was c/o J. S. Bache & Co. but no inquiries were made of that firm to ascertain his connections therewith or to obtain a better address (R. 58, 59). Finally, to avoid the possible effect of the New York statute of limitations, petitioners' counsel "* * * had to rush it (the lawsuit) through" (R. 53). Then followed a further delay of thirteen and one-half months after defendant Stern testified that Jules S. Bache was the beneficial owner of the stock before the instant action was commenced on November 13, 1943, more than eleven years and six months after the cause of action accrued.

The records of J. S. Bache & Co. for the period prior to October, 1931 (not 1935 as found by the district court) were destroyed in 1937 or 1938 (R. 74). As a result, respondents were unable at the trial to show under what circumstances and when the stock was obtained by Jules S. Bache and became security in his margin account with said firm (R. 72, 73, 74).

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[4] Armbrecht was served in the Friede action on August 13, 1936 at his home in the Bronx (R. 37; Finding of Fact 4, R. 101).

There is no finding as a fact by the district court as stated by the petitioners, at page 9 of their brief, that Charles Armbrecht was used as a "dummy" by Jules S. Bache and that laches could not be invoked by respondents who were in hiding until they were discovered by petitioners. While the district court in its opinion implied that Bache used Armbrecht as a dummy by stating "when" he did so, there is no finding of fact to that effect. Moreover, the district court's opinion leaves no doubt that the inferences which it drew therein were unquestionably based upon the clearly erroneous finding that the stock had been transferred to Armbrecht's name by Bache in October, 1931.[5]

Petitioners also assert, at page 9 of their brief, that the district court found as a fact that respondents were guilty of inequitable conduct. Again there is no such finding of fact or any such statement in the opinion, nor is there a single iota of evidence in the record which would sustain such finding.

The record is completely void of any act of commission or omission, fraudulent or otherwise, on the part of Armbrecht and Bache or either of them to conceal the ownership of the stock by Bache or to prevent the petitioners from instituting suit. The stock was transferred in January, 1928 from the name of J. S. Bache & Co. to the name of Charles Armbrecht, then one of its regular nominees, employed in the cage (R. 22, 70). Who owned the stock at that time does not appear (R. 74). But in October, 1931, available records showed that it was owned by Jules S. Bache and, while still registered in the name of Charles Armbrecht, was then held in the former's margin account with said firm. This was in complete accord with prevailing Wall Street custom and it would have been very unusual if the stock had been carried in the owner's name

[5] The Circuit Court of Appeals pointed out that the finding of fact that the stock was placed in Armbrecht's name by Jules S. Bache in 1931 is obviously an error, as the documentary records show (R. 116).

(R. 79). The district court not only recognized the custom, but commented that it could almost take judicial notice of the fact that a lot of certificates in Wall Street are not in the names of the real owners (R. 78, 79). While none of the findings of fact of the district court except one was disturbed, the Circuit Court of Appeals, after summarizing the respective claims of the parties as to the facts established by the evidence, expressly declined to pass upon this phase of the matter, saying "Decision of these matters and a fuller recital of the facts bearing upon them become unnecessary, however, in view of our conclusion that the rationale of the *York* case requires the application of the New York statute to this action" (R. 117).

The allegations of the complaint that the transfer to Armbrecht was fraudulent and that Jules S. Bache caused the stock to be placed in the name of Armbrecht as a nominal party or dummy to avoid stockholders' liability were denied by the answer and were wholly unsupported by any evidence at the trial. The district court accepted as sound law the ruling in *Broderick* v. *Aaron*, 264 N. Y. 368, that no obligation rests upon equitable grounds for failure to make a transfer of stock (R. 67, 68), and even remarked that "* * * the mere fact of the carriage of stock in another's name is no evidence of fraud at all, *prima facie*" (R. 68).

Charles Armbrecht was eighty-nine years of age on August 30, 1944 (R. 29). As it is a fair assumption that he must have endorsed the certificates of stock immediately after they were registered in his name in January, 1928, and, as he was a regular nominee of J. S. Bache & Co., it is obvious that no inference of deceit may be derived from his testimony given over sixteen years later, viz., on May 12, 1944 (R. 26)—that he did not remember the transaction. There is no proof in the record as to the financial worth of Armbrecht and all that may fairly be said is that he did not have $10,000 (R. 26). Nor does it appear from the record that Jules S. Bache or any member of the firm of

J. S. Bache & Co. knew or was ever advised of any of the notices stated to have been sent to Armbrecht in respect of the petitioners' claim (R. 104).

Summary of Argument

Point I

The decision of the Circuit Court of Appeals that petitioners' claim was barred by the New York statute of limitations is in accord with the expressed view of the Supreme Court and with the rule of the majority of federal decisions that federal courts of equity must apply state statutes of limitations in actions to enforce rights arising under federal statutes, provided there is no conflict with the federal statute involved.

Adherence to this rule is required equally with respect to cases involving private rights created by federal statute and diversity cases, wherever the federal and state courts exercise concurrent jurisdiction, for the sake of uniformity in the enforcement of litigants' rights.

Contrary to the assertion of petitioners and the assumption as to such fact in the briefs filed amici curiae, there was no finding by the district court that respondents were guilty of inequitable conduct. Even had there been such a finding the above rule applies.

If this Court decrees that state statutes of limitations are not strictly binding on federal courts in the adjudication of private rights federally created, nevertheless, the ten-year period of the New York statute will be applied by federal courts by analogy.

Point II

Assuming the doctrine of laches is pertinent, the district court erred in finding that petitioners were not guilty of laches. The contrary appeared. The record shows un-

reasonable delay on the part of the petitioners, to the prejudice of respondents and the district court should have so found.

Point III

The question now raised for the first time in this case that the cause of action did not accrue until 1935 cannot properly be considered by this Court. On the merits, however, the cause of action arose on May 2, 1932.

ARGUMENT

POINT I

The New York ten-year statute of limitations is conclusive herein and bars the suit.

(a) Rulings of this Court.

In law federal courts were bound by state statutes of limitations even before the decision of *Erie R. Co.* v. *Tompkins* (see *Guaranty Trust Co.* v. *York*, 89 L. Ed. 1418 at 1424). The conclusiveness of such statutes has been extended not only to state created rights at law, but also to rights at law created by federal statutes.

As stated by the Circuit Court of Appeals in its opinion (R. 120):

> "In enforcing legal rights under a federal statute, state limitation statutes have always been applied, as in proceedings to enforce private rights under the anti-trust laws, *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, Holmes, *J.*; cf. *Momand* v. *Universal Film Exchange*, D. C. Mass., 43 F. Supp. 996, 1008, Wyzanski, J., *Hansen Packing Co.* v. *Swift & Co.*, D. C. S. D. N. Y., 27 F. Supp. 364, Galston, *J.*, or for the infringement of patents, *Campbell* v. *City of Haverhill*, 155 U. S. 609, or for the statutory liability of a shareholder in a national bank,

McDonald v. *Thompson*, 184 U. S. 71; *Rawlings* v. *Ray*, 312 U. S. 96."[6]

The argument is made, however, that in *equity* suits federal courts are free to ignore state statutes of limitations. *Guaranty Trust Co.* v. *York* should have silenced this argument.

True, the *York* case was a diversity suit involving state created rights; and admittedly somewhat different principles might apply in respect of federally created rights, such as are involved in the case at bar. This Court, however, in *Russell* v. *Todd*, 309 U. S. 280, had previously decided that federal equity courts in cases involving federally created rights were bound to adopt state statutes of limitations applicable to equity actions. The *Todd* case held that even where a state statute of limitations is one ordinarily applicable to actions at law, if the state courts have applied it to equitable actions, a federal equity court would also apply it. Thus, said the Court at page 293:

> "We take it that in the absence of a controlling act of congress federal courts of equity, in enforcing rights arising under statutes of the United States, will without reference to the Rules of Decision Act adopt and apply local statutes of limitations which are applied to like causes of action by the state courts. Cf. *Mason* v. *United States*, 260 U. S. 545; *Jackson County* v. *United States*, 308 U. S. 343."

While the state statute of limitations was not adopted in the *Russell* case, this was only because it was one solely applicable to actions at law and it did not appear that the state courts had ever applied it to equity suits. As was pointed out, "the Court has not declined to give effect to a state statute shown to be applicable" (Id. p. 294).

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[6] See also: *Guaranty Trust Co.* v. *York*, 89 L. Ed. 1418, citing *Godden* v. *Kimmell*, 99 U. S. 201; *Alsop* v. *Riker*, 155 U. S. 448; *Benedict* v. *City of New York*, 250 U. S. 321, 327-8. And see: *Fisher* v. *Whiton*, 317 U. S. 217.

The Court's final comment that it had no occasion to consider the *extent* to which federal equity courts are bound to follow state statutes of limitations, certainly was not intended to contradict what had been said before. Having considered at great length the practice of equity courts in the adjudication of state and federal rights to follow state statutes of limitations, the Court did nothing more than to point out that there are possibly certain instances[7] where federal equity courts will not be strictly bound by otherwise applicable state statutes of limitations.

Russell v. *Todd* was followed by the United States Circuit Court of Appeals for the Eighth Circuit, in *Ball et al.* v. *Gibbs*, 118 Fed. (2d) 958, a case on all fours with the one at bar.[8] See also *Roos* v. *Texas Co.* (5th Circuit), 126

[7] The types of instances which the Court apparently had in mind were those involved in the cases cited in the footnote on pages 288, 289 of 309 U. S., that is, cases where the cause of action was based solely on fraud, viz.: *Bailey* v. *Glover*, 21 Wall. 342; *Kirby* v. *Lake Shore & Michigan Southern R. Co.*, 120 U. S. 130; *Michoud* v. *Girod*, 4 How. 503, and *Meader* v. *Norton*, 11 Wall. 442. The effect of these cases on our position will be considered *infra*, page 21 et seq.

[8] In *Ball et al.* v. *Gibbs* creditors of a joint stock land bank sued William D. Gibbs, who was the beneficial owner of bank stock, to enforce his liability under Section 812. Gibbs had owned and held the bank stock in his name from 1926 until April, 1930, when he transferred the shares, without consideration, to his daughter, Jane Gibbs, a minor. On January 7, 1931, on the expectation of being made an officer of the bank, he had Jane retransfer the shares to him. On March 30, 1931, not having been made an officer of the bank, he again transferred the shares to Jane Gibbs and they were registered in her name when the bank was declared insolvent on June 1, 1932. She attained her majority on April 15, 1933. Creditors' actions to enforce the double liability of the stockholders were immediately commenced. Jane Gibbs was served with process but did not appear. After much litigation the plaintiffs on June 15, 1938, brought an equitable action against William D. Gibbs before a federal court in Missouri where there was a five-year period of limitation prescribed in civil actions in respect of an action upon a liability created by a statute other than a penalty or forfeiture. The contentions of the plaintiffs pertinent here were that the action, being exclusively equitable, the Missouri statutes of limitations were inapplicable and that the federal courts should apply the doctrine of

Fed. (2) 767, and *Overfield* v. *Pennroad Corp.* (3rd Circuit), 146 Fed. (2d) 889.

Thus, it is no longer open to question that federal equity courts in the adjudication of federally created rights must apply state statutes of limitations. This conclusion has been fortified by the enactment of the new Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, providing that there should be only one form of civil action. In *Partridge* v. *Ainley*, 28 Fed. Supp. 472, at 476, the Court expressed the opinion that a federal court in a case of equitable cognizance, sitting in a state where there is a statute of limitations applicable to equity actions, would no longer be free to apply its own doctrine of laches after the adoption of the new federal rules.

We believe that disproportionate emphasis has been placed by the petitioners and the amici curiae on the fact that the right instantly in issue was federally created. Joint stock land banks were created as private institutions for the purpose of making profit. *Holmberg* v. *Armbrecht*, 24 Fed. Supp. 594 at 604. The rights which creditors of such banks were given by Congress to enforce a stockholder's double liability are *private rights*. It is not even certain that the enforcement of such rights adequately raises a federal question such as would justify the commencement of suit in a federal court in the absence of diversity,[38] as the Trustees so well recognize (Tr. Br. pp. 36-38).

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laches, of which the plaintiffs were not guilty. The Court, however, expressly rejected these contentions, holding that as the Supreme Court of Missouri had repeatedly held that the Missouri statutes of limitation apply alike to legal and equitable actions, the federal court would follow the Missouri statute, and that the action against the defendant having accrued on June 1, 1932, and having expired by limitation on June 1, 1937, it was barred on June 15, 1938, when he was first served with process.

[38] In the case at bar the jurisdiction of the federal court rests both on the fact that the matter in controversy is between citizens of different states and the fact that the suit was one to enforce a right created by federal statute (R. 4).

We can think of no reason to assume that Congress by its silence intended to discriminate in favor of creditors of this type by freeing them from the limitation bar which controls the rights of other types of creditors. The reasoning of the Court in *Campbell* v. *City of Haverhill*, 155 U. S. 610, is persuasive. There the question was whether the statutes of limitations of the several states applied to actions at law for infringement of patents, a federally created right and solely enforceable in federal courts. At the time the cause of action arose, there was no limitation in the federal statute. The Court, in holding that the Massachusetts six-year statute of limitations applied, said as follows, page 616:

> "But why should the plaintiff in an action for the infringement of a patent be entitled to a privilege denied to plaintiffs in other actions of tort? If states cannot discriminate against such plaintiffs, why should Congress by its silence be assumed to have discriminated in their favor? Why, too, should the fact that Congress has created the right, limit the defenses to which the defendant would otherwise be entitled? Is it not more reasonable to presume that Congress, in authorizing an action for infringement, intended to subject such action to the general laws of the state applicable to actions of a similar nature? In creating a new right and providing a court for the enforcement of such right, must we not presume that Congress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction?
>
> "Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions."

The reasoning of the Circuit Court below is even more cogent, for it said:

> "It would be anomalous, indeed, to hold rights under these important federal laws (i.e., anti-trust, patent and national bank laws) strictly subject to state

limitations, and at the same time to permit the most extreme variation in the bar period for actions to enforce the statutory liability of a shareholder in a federal land bank. Such a divergence in treatment is opposed not only to common sense, but also to the clear implications of the *York* case. For that case quoted with approval the following statement from the dissenting opinion of Judge A. N. Hand, below: 'In my opinion it would be a mischievous practice to disregard state statutes of limitations whenever federal courts think that the result of adopting them may be inequitable. Such procedure would promote the choice of United States rather than of state courts in order to gain the advantage of different laws.' *York* v. *Guaranty Trust Co.*, 2 Cir., 143 F. 2d 503, 531". (R. 120)

(b) The rationale of the doctrine of uniformity.

There are, too, policy considerations underlying this whole problem, which strongly vindicate our position.

Our starting point must be, as it was in the *York* case, "the policy of federal jurisdiction which *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, embodies" (see *Guaranty Trust Company* v. *York*, *supra*, at page 1419).

It was the possibility for discrimination inherent in a system where courts of concurrent jurisdiction were able to reach directly opposite results on the same facts—sometimes even in litigation between the same parties[9]—that eventually necessitated the enunciation of the rule of uniformity of *Erie* v. *Tompkins*.

True, *Erie* v. *Tompkins* expressed only the rule to be followed where the federal court is sitting in diversity. However, where a federal court exercises concurrent jurisdiction with state courts, it would not seem to matter on which hook the jurisdiction of the federal court is hung: that is, diversity or existence of a federal question. The fact that the jurisdiction is exercised concurrently should

[9] See cases cited in *Erie R. Co.* v. *Tompkins*, *supra*, at 75, fn. 9.

be sufficient to bring into play the principle of uniformity expounded in *Erie* v. *Tompkins* and expanded in *Guaranty Trust Company* v. *York*. In regard to the application of this principle of uniformity the only material distinction between the case at bar and *Guaranty Trust Company* v. *York* is that the rights here involved were created by the federal government, whereas a state right was in issue in the *York* case.[10] The important question which this Court has now to decide is whether the fact that the source of the right is federal, rather than from a state, warrants the abandonment of the principle of uniformity expressed in *Erie R. Co.* v. *Tompkins*. We think not.

The need for a policy of uniformity goes beyond diversity cases. State and federal courts often exercise concurrent jurisdiction of rights created by federal statutes.[11] As a matter of fact, this very action could as well have been brought in a state court.[12] The mischief to be avoided in these cases is the same as existed in the diversity cases before *Erie* v. *Tompkins*—that is, the possibility of shopping for a favorable jurisdiction.

Of course, this is not to say that to achieve uniformity in the adjudication of federal questions, as to which the state and federal courts exercise concurrent jurisdiction,

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[10] Petitioners rest heavily on the fact that this Court in the decision of the *York* case expressly ruled out of its considerations questions relevant to the disposition of a claim based on federal law. This Court, in rendering its decision in the *York* case, was not placing to one side *all* cases involving claims based on federal law, but only those cases where the federal statute in issue contained a period of limitation inconsistent with that of the state law, as the Circuit Court well recognized (R. 118).

The rule of the latter cases would, of course, be irrelevant in deciding a matter such as *Guaranty Trust Co.* v. *York;* but as the litigation at bar involves no conflicting federal statute of limitation, it is not of the type which this Court expressly put to one side in the decision of the *York* case.

[11] See, e.g., Federal Reserve Act § 123, 12 U. S. C. A. § 264(j), authorizing the Federal Deposit Insurance Corp. to sue or be sued in any court, state or federal. See, also, *Schram* v. *Keane*, 279 N. Y. 227.

[12] See note 17, *infra*.

dominance must be given to state law. While some problems require settlement in terms of local or state law, others just as surely call for a solution on a more national basis. In certain types of cases, the "attractive vision of a uniform body of federal law" [13] suggests the supremacy of federal law. In other types of cases, the equally attractive vision of conformity with the state courts in the enforcement of litigants' rights within any given geographical area, suggests the adoption of state law. In every case it is a matter of weighing and balancing these two competing and irreconcilable considerations. The Government urges that wherever a right is derived from a federal statute, it is more important that there be, so far as possible, nation-wide uniformity among the federal courts, rather than uniformity between state and federal courts in the same state (Br. pp. 4-5). We disagree. Of course, broad national questions, involving the rights of the Government and the interests of the entire country cannot be left to the vagaries of state law and consequently should be settled uniformly throughout the country. See, e.g., *Clearfield Trust Co.* v. *U. S.*, 318 U. S. 363. And in important questions of *private* rights involving the effectuation of federal legislative policy, state law should not be allowed to frustrate or nullify such federal policy. *D'Oench, Duhme & Co.* v. *F. D. I. C.*, 315 U. S. 447. But in other cases of private rights, where there is no such need for nation-wide uniformity, the predominant consideration is conformity in the enforcement of litigants' rights in any given area, for such conformity would eliminate the practice of "jockeying for jurisdiction", which has been described as the heart of *Erie* v. *Tompkins*.[14]

It must be obvious that not all issues arising in cases involving federal statutes present broad federal questions

[13] The phrase is Mr. Justice Frankfurter's in *Guaranty Trust Company* v. *York*, *supra*, p. 1420.

[14] Clark, J., Lecture on State Law in the Federal Courts, Vol. 114, No. 129, N. Y. L. J. 1575, at 1576, col. 7.

concerning the interests of the entire nation. For example, collateral issues in bankruptcy cases, regarding the interpretation of conditional sales, chattel mortgages and pledges are matters of local property law which even under the doctrine of *Swift* v. *Tyson*, 16 Pet. 1, were relegated to the state precedents.[15] And in such cases it has been recognized that principles controlling a plenary civil action in the state courts should apply in a summary bankruptcy proceeding.[16]

So also, the question of the proper period of time within which private rights accruing under a federal statute must be enforced, is a question of no great national interest. Both the Government (Br. p. 5) and the Trustees (Br. p. 34) admit that it would not impair the protection of federal rights to give effect to the varying state statutes of limitations in the ordinary case. And underlying all those cases cited above, at pages 8-11, wherein federal courts have applied state statutes of limitations in the enforcement of federal statutes, is the same admission. If the case at bar had originally been brought in a state court, as well it might have been,[17] the state court, respecting the recognized supremacy of the federal courts on federal questions,[18] undoubtedly would have felt itself bound by interpretations of the federal courts on the provisions of the statute, but would have applied its own appropriate state

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[15] *Ibid.*

[16] See *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, where the Supreme Court directed the bankruptcy court to seek a state court adjudication. Cf. *Wickes Boiler Co.* v. *Godfrey-Keeler Co.*, 116 F. 2d 842 (C. C. A. 2), rev'd 121 F. 2d 415, cert. den. 314 U. S. 686. See also Clark Lecture, *loc. cit. supra*, note 14.

[17] See Circuit Court decision below, R. 120-121, citing *Friede* v. *Jennings*, 184 Atl. 369 (Conn.); and *Friede* v. *Sprout*, 2 N. E. (2d) 549 (Mass.). Had Congress meant to leave these questions to the exclusive jurisdiction of the federal courts, it would have so stated in the Act, as it did, for example, in the case of actions to recover the liability of stockholders of national banks in the case of voluntary liquidation. See, 12 U. S. C. Sec. 65.

[18] See, e.g., *Clearfield Trust Co.* v. *United States*, 318 U. S. 363

statute of limitations in determining the time within which the plaintiff had to commence his action.[19]

The Government has suggested that uniformity between the state and federal courts could in many instances be obtained by the adoption of a uniform federal law throughout the nation (Br. p. 5). This argument is not valid in connection with the problem of the appropriate period of limitations. If the federal courts were to apply their own rule of limitations, based, as it would be, only upon principles of laches, there would be no uniformity even among federal courts; for under the "notoriously amorphous"[20] and "uncertain"[21] laches rule, litigants' rights would be subject to innumerable variations in the federal courts, depending upon the operation of the particular instincts of the trial judge on any given state of facts. Far from creating uniformity, therefore, a federal rule of laches would only reinstate the chaos and confusion that the decisions of this Court in the *Erie* and *York* cases have set to rest.

If it be argued that the rule of the *Erie* and *York* cases was not meant to apply to cases of federally created rights, the answer as given by Justice Clark,[22] of the Second Circuit, is, we must fashion one of similar character for such cases.

(c) Absence of inequitable conduct.

Petitioners and the amici curiae concede that in the ordinary case a federal court, in equity as well as at law, will respect the principle of uniformity by applying state statutes of limitations in the adjudication of federally created rights (Pet. Br. p. 13; Tr. Br. p. 31, Govt. Br. p. 2).

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[19] *Schram* v. *Keane*, 279 N. Y. 227, at 230.

[20] Rutledge, J., dissenting in *Guaranty Trust Co.* v. *York*, *supra*, at 142).

[21] Clark, J., dissenting in *Todd* v. *Russell*, 104 Fed. (2d) 169, at 176 (C. C. A. 2d).

[22] Lecture op. cit. *supra*, note 14, at 1576, col. 2.

But, they contend, where a defendant is guilty of such inequitable conduct as would tend to affect the commencement of the suit, a federal equity court has extraordinary powers to toll, if not entirely disregard, state statutes of limitations in dealing with federally created rights. The vice of such arguments here is that the fulcrum on which they turn is the assumption that Bache was guilty of some sort of inequitable conduct either in making the transfer to Armbrecht in the first place, or in continuing to carry the stock, after he acquired it, in the name of the nominee. This assumption is erroneous.

Bache was under no duty, equitable or otherwise, to have the stock registered in his own name (see *Broderick* v. *Aaron*, 264 N. Y. 368, 377).

The courts frequently have recognized the widespread practice for owners of stock to have that stock registered in the name of nominees.[23] It is well known that banks, both state and national, carry stock in the names of nominees—often partnerships created among certain of their officers—for the purpose of facilitating the transfer of such stock, *inter alia*. As the district court commented, "there must be any number of reasons that a man can give readily for carrying stock in a name other than his own" (R. 68). In the case at bar, of course, there was a compelling reason for holding the stock in the name of a nominee, for here, in accordance with custom, the stock was pledged with the brokerage firm as security for Bache's personal margin account.

For a transfer to be inequitable it must be made with the sole or primary purpose of avoiding the statutory liability, as petitioners' own cases show. (See cases cited pp. 20-21, Pet. Br.) The implication of the district court, creating the impression that there was something unethical about Bache's conduct, was based on a patently erroneous finding, that the stock was placed by Bache in Armbrecht's

[23] Counsel for petitioners acknowledged the legitimacy of the practice by saying: "Now if I am to put stock, for example, in the name of my wife, with her full knowledge, I might not be guilty" (R. 68).

name in 1931 shortly before the bank's insolvency; whereas, the undisputed documentary proof in the record shows that it was placed in Armbrecht's name by J. S. Bache & Co. in January, 1928, years before there could be reason to suspect or anticipate the imminent possibility of double liability.

Petitioners contend that respondents were "found" guilty of inequitable conduct by the district court. They are wholly in error as to this as there was no such finding. Further, there is nothing in the record that would support such a finding or support even an inference that Bache's purpose in retaining the stock in Armbrecht's name as nominee was to avoid liability. Quite the contrary appears in the record. The district court recognized that this was a perfectly legitimate practice, which could in no way be construed, *prima facie*, as designed to avoid liability, because it obviously would not have this effect (R. 68). The mere transfer of shares, and the maintenance of silence with regard thereto, is in no respect improper or illegal (see *Ball* v. *Gibbs*, 118 F. [2d] 958, 961, 962 [C. C. A. 8]).

(d) The arguments of petitioners and the amici curiae have failed to meet the issue.

Since Bache was not guilty of inequitable conduct, our opponents' arguments cannot avail on the facts of record before this Court, even if such arguments were supportable as a matter of law. Moreover, their arguments are not supportable as a matter of law, as we shall now show.

To what do they attribute the asserted power of a federal equity court to disregard state statutes of limitations in dealing with federal questions? Some of their arguments seem to attribute it to the equitable nature of the right in issue, while others of their arguments attribute it to the federal source of the right.

Thus, one argument of petitioners is that in cases of equitable cognizance federal courts need not apply state

statutes of limitations, because in such cases they are not controlled by the Rules of Decision Act (Pet. Br., p. 11). We find the answer to this argument in a single quotation from *Guaranty Trust Co.* v. *York*, 89 L. Ed. 1418, at 1420-1421, where this Court said that the Rules of Decision Act

> "was deemed, consistently for over 100 years, to be merely declaratory of what would in any event have governed the federal courts and therefore was equally applicable to equity suits."

Another argument of petitioners, that the equitable rule of laches is determinative in this case, thereby enabling an equity court to toll the period during which defendants remain in hiding (Pet. Br., pp. 18-19), is based on the erroneous premise that laches, not statutes of limitations, is the sole barometer in all equity actions (id., p. 12). This premise stands in the very teeth of the ruling in *Russell* v. *Todd*, 309 U. S. 280, 287, 293, that federal equity courts apply state statutes of limitations applicable to equity actions.

The Trustees, on the other hand, do not make the mistake of arguing that equity is bound only by laches, not by statutes of limitations, in the ordinary case; but they contend that by virtue of the historic power of an equity court to relieve against fraud and inequitable conduct, the federal court will not be bound by state rules of limitations where the defendant is guilty of fraud (Tr. Br., pp. 25-32); and thus, say the Trustees, in such cases federal courts are free to apply a rule of laches (id., p. 29).

The Government has made an argument very similar to that of the Trustees (set forth above), to the effect that the power of a federal court in cases of fraud and inequitable conduct, to qualify a statute of limitations to the extent of tolling it until the discovery of the fraud, enables a federal court in an appropriate case to disregard a state rule regarding the period of limitations (Govt. Br. pp. 6-8).

The emphasis in all these arguments is on the power which a federal court derives from the equitable nature of the case before it. Assuming that these suits to recover the statutory liability are fundamentally equitable, we cannot agree with the Government and the Trustees that the power of a federal equity court to relieve against fraud gives the federal court power to ignore or qualify an otherwise controlling state statute of limitations, even if we were to concede that Bache was guilty of inequitable conduct. The power to relieve against fraud is embodied in the leading case of *Bailey* v. *Glover*, 21 Wall. 342, and its successor, *Exploration Co.* v. *United States*, 247 U. S. 435. The simple rule of law of these cases is that, in matters where the object of the suit is to obtain relief against fraud, federal "statutes of limitations upon suits to set aside fraudulent transactions shall not begin to run until the discovery of the fraud" (*Exploration* case, at 449). It is this rule (and not, incidentally, any doctrine of laches, as claimed by the Trustees at p. 29 of their brief) that was relied on in the now repudiated diversity case of *Kirby* v. *Lake Shore & Michigan Southern Railway*, 120 U. S. 130, to support the power of a federal court in a case based on fraud to toll the running of a state statute of limitations until the discovery of the fraud.

It must be pointed out that this power to toll the statute of limitations exists only where "the object of this suit is to obtain relief against fraud"[24]—that is, "where relief is asked for on the ground of actual fraud".[25] It is patent that fraud is not the foundation of a suit to recover the statutory liability imposed upon stockholders by Title 12, § 812, of the United States Code (see *Downey* v. *Palmer*, 32 F. Supp. 344, 345-346 [S. D., N. Y.], rev'd on other

[24] *Bailey* v. *Glover*, *supra*, at 347.

[25] *Kirby* v. *Lake Shore & Michigan Southern Railway*, *supra*, at 136.

grounds 114 F. [2d] 116 [C. C. A. 2]).[26] Thus the rule of *Bailey* v. *Glover* has no bearing on the case at bar.

Even if we agree that this rule is broader than the cases seem to indicate and the theory of the fraud cases is available to our opponents, this does not establish the contention of the Government and the Trustees that because a federal court has the power to qualify or reject *federal* statutes of limitations where they are applicable, by the same token it has the power to qualify or reject *state* statutes of limitations where they are applicable. Different problems from those raised in the *Bailey* case are presented when a state, rather than a federal statute of limitations is before a federal court. We may concede that the *Bailey* case expresses the federal rule on the question of the proper application of federal statutes of limitations. It is also expressive of the "now almost universal"[27] rule in this country in both state and federal courts; *e.g.*, see New York Civil Practice Act, § 48, subdiv. (5); *Clarke* v. *Gilmore*, 149 App. Div. 445, 450; *Dodds* v. *McColgan*, 229 App. Div. 273. But the *Bailey* case only announces the sub-

[26] The instant action cannot be classified as one to recover a judgment on the ground of fraud (Civil Practice Act, § 48 (5)), because the respondents' liability is based upon their ownership of the stock, record or beneficial, not on fraud (*Forrest* v. *Jack*, 294 U. S. 158; *Ohio Valley National Bank* v. *Hulitt*, 204 U. S. 162; *Pauly* v. *State Loan & Trust Co.*, 165 U. S. 606; *Durrance* v. *Collier*, 81 F. (2d) 4, 7; *Broderick* v. *Aaron*, 264 N. Y. 368, 373). The cause of action accrues apart from any element of fraud (*Glover* v. *National Bank of Commerce*, 156 A. D. 247; *Carr* v. *Thompson*, 87 N. Y. 360; *Brick* v. *Colin-Hall-Marx Co.*, 276 N. Y. 259, 264; *Druckerman* v. *Harbord, et al.*, 31 N. Y. S. 2d 867, 870, and *Adolf Gobel, Inc.* v. *Hammerslough*, 263 A. D. 1, 2, aff'd 288 N. Y. 653). Furthermore, if fraud would have been alleged and proved, it would have been constructive fraud, not actual fraud, and the statute, therefore, would have begun to run at the time when the fraud was perpetrated, not when actually discovered (*Hearn 45 St. Corp.* v. *Jano*, 283 N. Y. 139; *Nasaba Corp.* v. *Harfred Realty Corp.*, 287 N. Y. 290; *Battles* v. *Smith*, 281 N. Y. 226). Finally, the complaint does not contain sufficient allegations to sustain an action for fraud and deceit (*Curacao Trading Co., Inc.* v. *W'm. Stake Co.*, 2 Fed. Rules Dec. 308 and cases cited), and fraud was not proved at the trial.

[27] *Exploration Co.* v. *United States*, *supra*, at 449.

stantive law of the forum, stating the rule to be applied where the federal court is free to apply its own rule without regard to state laws, because there is no applicable state statute of limitations. The *Bailey* case did not decide that a federal court is free to apply its own rule of limitation *in disregard* of an otherwise applicable state statute of limitations. That the court in the *Kirby* case thought it did is irrelevant. Upon later reflection, the *Kirby* holding in this regard was rejected (see *Guaranty Trust Co.* v. *York*, *supra*, at 1425).

Since the decision in the *Kirby* case it has been decided that a federal court cannot apply the federal rule of the *Bailey* case, in disregard or qualification of an applicable state statute of limitation, where the matter in issue involves a state created right (*Guaranty Trust Co.* v. *York*). It remains to be decided by the case at bar whether the federal rule may be applied in disregard of an applicable state statute of limitation where the matter involves a federally created right.

It only begs the question to argue, as have the Trustees (Br., pp. 30-31) and the Government (Br., p. 8) that because the federal rule was applied, as such, in cases where a federal statute of limitation is involved, it must follow, *a fortiori*, that the federal rule will be applied, as such, whenever the federal court is expounding a federal jurisprudence, even where an appropriate state statute of limitation would ordinarily be controlling due to the absence of a federal one. This no more follows than it does to argue that, because New York has in its Civil Practice Act, § 48(5), a rule similar to that of the *Bailey* case, which it applies to actions based on New York rights, it will apply the same rule to actions based on New Jersey rights, *a fortiori*. It is not an *a fortiori* situation. An entirely different type of problem is presented when one jurisdiction is dealing with the question of the conclusiveness of the laws of another jurisdiction. Of course, we do not claim that the question of the conclusiveness of a state statute of limitations in a federal court in the case of a

federally created right is analogous to the question in the usual conflicts case. We realize that the respect which New York might give to New Jersey law in adjudicating a New Jersey right is based on such principles as comity and "full faith and credit"; whereas, the respect which a federal court might give to New York law in adjudicating a federal right would be based on principles of uniformity, such as were expounded in *Erie R. Co.* v. *Tompkins*. But the type of problem in both cases is the same, for in both, the problem of the conclusiveness of the laws of a jurisdiction other than the forum is present.

If this Court in the instant case decrees that, because of the existence of concurrent jurisdiction with the state courts, a uniformity of decision should prevail between state and federal courts in any given territorial area, the federal courts are no longer free to apply their own rule of *Bailey* v. *Glover* in cases of concurrent jurisdiction, unless it is also decreed that, under the analysis suggested *supra*, page 15, this is the type of problem in which uniformity should be attained by adherence to federal rather than state law.

The rule argued for by the petitioners (Br., pp. 18-19) to the effect that laches does not run in favor of a defendant in hiding, is similar in type to the rule of *Bailey* v. *Glover*. It, too, is, at most, a substantive rule of law that might be applied by the federal courts where they are free to apply their own rule, and the question whether they are free to apply such a rule is for this Court now to decide as a matter of fresh impression.

We submit, therefore, that those arguments that base the asserted right of a federal court to ignore state statutes of limitations on some equitable power are not persuasive, as they do not meet the issue before this Court.

It remains for us to consider the validity of those arguments contending that the fact that the source of the right is federal gives a federal court greater latitude in applying or disregarding state statutes of limitations.

Petitioners argue that state laws are inapplicable to rights created under federal statutes (Br., p. 13). As a general proposition, this statement is, of course, unsupportable. We have already seen that federal courts are bound by state statutes of limitations in proceedings to enforce rights created by the anti-trust laws, patent laws and the National Bank Act; and we have also seen that federal bankruptcy courts adopt local rules with regard to such collateral issues in bankruptcy as the interpretation of conditional sales, mortgages and pledges. In view of the cases cited by the petitioners to support the above statement, namely, the *Deitrick* and *D'Oench* cases, it is obvious that they do not have in mind any such broad proposition. Rather, they apparently have in mind the same proposition that is contended for by the Trustees and the Government to the effect that a federal court has power to ignore state statutes of limitations in certain cases, which power can be "predicated on" (Br., p. 32) or "articulated * * * in terms of" (Govt. Br., p. 13) the rule that in exclusively federal matters—that is, where the rights are created by federal statute or the constitution—a federal court will qualify or completely disregard an otherwise applicable state rule, where to give effect thereto would nullify or frustrate the federal policy expressed in the statute. This principle of subjugating state law to effectuate federal policy seems first to have been clearly expressed in the case of *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U. S. 447, although the slightly earlier and very similar case of *Deitrick v. Greaney*, 309 U. S. 190, was a harbinger of the doctrine.[28]

[28] The Government, incidentally, seems to have attempted to ascribe to the *Bailey* case the attributes of the *D'Oench* case, claiming that underlying the *Bailey* case was the doctrine of preventing the frustration of federal policy. A reading of the *Bailey* case quickly dispels this contention. As we have already noted, the *Bailey* and *Exploration* cases did not consider the special problem of the power of a federal court to override applicable state law in dealing with federally created rights.

We find considerable merit in the doctrine of the *D'Oench* case. We agree that in the adjudication of federal rights, federal courts need not blindly follow state rules, the application of which would nullify or frustrate the clear purpose and policy of the federal legislation involved. In our argument above (at p. 15) we readily agreed that the doctrine of uniformity does not require federal courts to yield to state courts in matters where the effectuation of federal policy hangs in the balance. In the ordinary instance, however, it is agreed by the Trustees (Br., p. 34) and the Government (Br., p. 5) that state limitations statutes governing private rights do not conflict with or frustrate federal policy, even though they may vary from state to state. The policy behind statutes of limitations is more venerated than any policy embodied in any single federal statute and, in fact, runs through all federal statutes. To require the commencement of an action on a right created by federal statute within a reasonable time is plainly consistent with the policy of such statute.

(c) The state statute controls if only by analogy.

We believe that we have successfully shown that federal courts, at least in the adjudication of *private* rights created by federal statute, are bound to follow state statutes of limitations applied to similar matters in the state courts. However, even if this Court rules that state statutes of limitations are never strictly binding on federal courts in the adjudication of federally created rights, the ten-year period of the New York statute of limitations would be controlling here. For it is conceded that even courts which are not strictly bound by state statutes of limitations will apply the periods of related statutes of limitations, if only by analogy. In applying state periods, courts never *lengthen* these periods; they take them as they are, only reserving the power to toll them against a defendant guilty of fraudulent conduct the nature of which is unknown to the plaintiff. See *Bailey* v. *Glover*, *supra*, and *Explora-*

tion Co. v. *United States, supra.* When the tolling ceases (as on the discovery of the fraud) a period of limitations is applied exactly as specified in the relevant state statute of limitations (see *Kirby* v. *Lake Shore & Michigan Southern Railway*, 120 U. S. 130, 139), except that in extraordinary cases a court will *shorten* this state period by virtue of the doctrine of laches. We believe that the record here shows petitioners were guilty of laches, as we hereafter point out in our Point II. However, under the foregoing analysis it is unnecessary for us to establish that petitioners were guilty of laches for the reason that the ten-year period of limitation which must be applied in any event, if only by way of analogy, has expired.

It is odd to note that the petitioners have cried "laches" in this case. Laches is a defendant's weapon. It is the doctrine whereby a court in a case of equitable cognizance can modify an otherwise controlling statute of limitations to the extent of *shortening* it in a case where the plaintiff has been guilty of an unreasonable delay in the prosecution of his claim, to the prejudice of the defendant (*Groesbeck* v. *Morgan*, 206 N. Y. 385; *Hall* v. *Ballard*, 90 F. [2d] 939, 946; 2 Carmody, New York Practice [1930], Secs. 409, 411). Laches never has the effect of lengthening a statute of limitations (*Ball* v. *Gibbs, supra*, at 960-961).

POINT II

Assuming that the doctrine of laches is pertinent, the district court should have found that the petitioners were guilty of laches.

Only if this Court shall decide that the state statute of limitations is neither binding nor controlling by analogy does the question of whether the petitioners were guilty of laches become important. The Circuit Court, in view of its decision, found it unnecessary to decide this question. If this Court, however, reaches a result which makes

it necessary to consider the question of laches, we assume that it will remand the case to the Circuit Court for the consideration of this question.

Owens v. *Union Pacific R. Co.*, 319 U. S. 715;
Grant v. *A. B. Leach & Co., Inc.*, 280 U. S. 351;
Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491, *rev'g* 279 Fed. 488;
Liberty Oil Co. v. *Condon National Bank*, 260 U. S. 235.

In the event that this Court may itself determine to consider the question, we shall now discuss it. At the outset we point out that whatever may be said by the petitioners, by way of excuse, that it took them more than ten years to find out that Jules S. Bache was the beneficial owner of the stock, can under no circumstances avail them in respect of their failure to proceed for that period against Armbrecht. As a matter of fact, had they proceeded against Armbrecht with any degree of diligence they would have promptly discovered, as they did when they finally brought their action, that Jules S. Bache was the beneficial owner of the stock. Even when they did discover it in 1942, they waited over thirteen months to start action against him.

Any difficulties which the petitioners and their attorneys suffered in the early stages of the litigation against the bank stockholders were completely resolved on December 24, 1936, by the decision on appeal in *Holmberg* v. *Carr*, 86 Fed. (2d) 727 (R. 37). With the legal difficulties solved, all that was required was the normal procedure of serving Armbrecht. This had been accomplished in a prior action without apparent difficulty in August, 1936 (R. 101, Finding of Fact 4) and the record shows no valid reason for the failure to serve him again until November, 1943. Despite the long period of inactivity between August, 1937 and January, 1942, and the additional period of thirteen months after September, 1942 during which petitioners and their

attorneys did nothing to pursue Jules S. Bache, the district court refused to sustain respondents' claim that expedition was lacking, and held, contrary to the evidence, that petitioners were not prejudiced even if there were delay.

The elements of laches—delay in bringing the action and the resulting prejudice to the respondents—are both present. We believe it unnecessary to further argue the point that, on the record here, waiting more than eleven years to commence suit, constituted delay. Not only was the delay unwarranted, but petitioners' conduct evidences a sheer lack of diligence. Whatever credit they may assert in respect of the diligent prosecution of their claims against other stockholders, cannot on any theory avail them here. Their argument below to the effect that they were unable to serve Armbrecht was based on their counsel's statements that he could not be located as reported by this one or that one who said they did not know where he lived, but they never at any time went to the people who would know his address, that is, his son, whose address and telephone number counsel had and gave to the process server, and J. S. Bache & Co., in whose care he was listed on the very books of the Bank. True, counsel for petitioners testified he personally had made an effort to locate Armbrecht, visiting in the summer of 1937 the address at which he had been served in 1936 (R. 51). But counsel did nothing further so far as Armbrecht was concerned until after an accidental meeting with western counsel in December, 1941 or January, 1942 (R. 52-53). Subsequently, in the realization that the ten-year statute of limitations was about to bar the petitioners, he commenced suit in May, 1942 against Armbrecht and included the firm of J. S. Bache & Co. as a defendant. No explanation for this long delay was given or offered at the trial and no attempt was made in any respect to excuse it.

Petitioners' claim, made at the trial, that it necessarily took them more than ten years to find out that Jules S. Bache was the beneficial owner of the stock is con-

pletely without merit. It appeared on the Bank's own records that the stock had been placed in Armbrecht's name by J. S. Bache & Co. in 1928, that Armbrecht's address as set forth on the stubs of the certificates was care of "J. S. Bache & Co., 42 Broadway, New York", and that on each of the three cancelled certificates in the name of J. S. Bache & Co., making up the one hundred shares in suit, there was stamped a notation that J. S. Bache & Co. disclaimed any interest in the stock and had acted only as broker for account of a customer. This certainly put anyone who was interested on notice that J. S. Bache & Co. knew the name of the customer for whom it had acted. The original stock records of the Bank were at all times available to petitioners' trial counsel. He actually had them in his possession in May and June, 1938 and he admits that he looked through them while trying the *Holmberg* v. *Anchell* case before Judge Woolsey (R. 59). Action against Armbrecht and J. S. Bache & Co. might then have been started; and, irrespective of service upon Armbrecht, one or more of the numerous members of the firm of J. S. Bache & Co. could readily have been served. Therefore the name of Jules S. Bache as the beneficial owner of the stock, so readily testified to by Stern when he was examined before trial in September, 1942, could just as easily have been obtained at least in 1938.

If it be argued that counsel's activities on behalf of petitioners against other respondents kept him too busy during the period between 1936 and the entry of judgment in February, 1939 in the *Anchell* case to bother about Armbrecht and his stock, for that seems to be the plaint of the decision of the district court, there is certainly no such basis for his failure to proceed promptly against Jules S. Bache when he learned in September, 1942 that he was the beneficial owner of the stock. For more than thirteen months thereafter counsel did nothing so far as Jules S. Bache was concerned. It is apparent that he felt that the ten-year statute of limitations had run against Bache.

This delay was prejudicial to the respondents. The complaint herein did not contain sufficient allegations for an action for fraud and deceit; and it therefore was apparent under the decisions that based on this theory the petitioners could not succeed.[29] Bache, in his answer, frankly admitted beneficial ownership of the stock. Carrying the stock in the name of a nominee was the usual practice and the law is well settled that such practice *prima facie* is in no respect fraudulent.[30] Bache, therefore, had every reason to believe and to rely on the fact that there was nothing for him to do except await the trial. The burden of proving fraud was upon the petitioners; and Bache knew, and the record of the trial justifies his belief, that petitioners could not succeed in establishing any fraud.

No amended complaint was ever served. At the trial, seven months after Bache's death, the petitioners made no attempt to prove that Bache had been guilty of fraud. Instead they asserted that Bache, aided by Armbrecht's failure to meet his liability by some obligatory affirmative act, the nature of which was not stated, had been guilty of inequitable conduct by permitting the stock to be held in his margin account in the name of Armbrecht. No evidence, however, was offered of any wrongdoing or improper conduct on the part of Bache.

It is a well-established principle that the rule of laches is especially to be enforced where the right to relief is based on the alleged fraud of a person who had died (*Naylor* v. *Foreman Blades Lumber Co.*, 230 Fed. 658; *Hammond* v. *Hopkins*, 143 U. S. 224). The rule generally applies in cases where the person charged with fraud or inequitable conduct died before the institution of the suit. But we cannot find any reason why the same rule should not apply in the present case in which, although the suit was instituted before Bache's death, the contention that

[29] See footnote 26, *supra*.

[30] See page 18, *supra*.

Bache was guilty of inequitable conduct was for the first time advanced after he was dead. His death, coming as it did so soon after the action was commenced, prevented the respondents from meeting the claim that his conduct was inequitable, in that they were unable to adduce any proof to meet a claim never advanced while he was alive.

Petitioners' long lapse of time in bringing the action prejudiced the respondents in still another way, for in 1937 or 1938 J. S. Bache & Co. had destroyed all its records of transactions prior to October, 1931 (R. 74). Respondents were thus prevented from establishing when and under what circumstances Jules S. Bache acquired the stock, and his reason for holding it in the name of a nominee. The importance that the district court placed upon the time when Jules S. Bache acquired the stock is shown by the significance the court attached to the erroneous findings that Bache had acquired it in October, 1931 and then caused it to be placed in Armbrecht's name.

Respondents were thus prejudiced by the long delay and the district court erred in not finding petitioners guilty of laches. As was said by this Court in *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, at 348-9:

> "*Statutes of limitation, like the equitable doctrine of laches*, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend *within the period of limitation* and that the *right to be free of stale claims* in time comes to prevail over the right to prosecute them." (Italics supplied.)

POINT III

The question as to the date of accrual of the cause of action cannot properly be considered by this Court.

The Trustees and also the petitioners (the latter with obviously less conviction) have attempted to place before this Court the question of when the cause of action herein accrued, on the theory that if this Court should decide that the state statute of limitations is binding on federal courts, the petitioners might be deemed to have brought their action within the time specified in the applicable state statute of limitations. The question of when the cause of action accrued against the stockholders of the Southern Minnesota Joint Stock Land Bank is a brand new question so far as this suit is concerned. Sufficient facts were not introduced at the trial with which to decide the question. The question was not raised in the briefs, nor argued orally before either of the lower courts; and, therefore, it was never considered or passed upon by the lower courts. Furthermore, it was not raised in the petition for certiorari addressed to this Court. It has always been assumed by all the parties and the lower courts that the cause of action accrued on May 2, 1932, the date the Bank closed its doors and was declared insolvent by the Federal Farm Loan Board, who thereupon appointed a statutory liquidating receiver pursuant to Title 12, § 963 of the United States Code. (See *Holmberg* v. *Southern Minnesota Joint Stock Land Bank*, 10 Fed. Supp. 795, 796, 801; *Holmberg* v. *Anchell*, 24 Fed. Supp. 594, 600). Suddenly in the brief filed by the Trustees as amici curiae in this Court, the question was raised for the first time.

As a matter of law, it is obvious that this question can not be considered by this Court. In the first place, it was neither raised as a question nor assigned as error in the petition for a writ of certiorari.

See:

Rorick v. *Devon Syndicate Ltd.*, 307 U. S. 299;
Crown Cork & Seal Co. v. *Ferdinand Gutmann Co.*, 304 U. S. 159;
General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175;
Olson v. *United States*, 292 U. S. 246;
Gunning v. *Cooley*, 281 U. S. 90.

See, also:

Johnson v. *Manhattan Railway Co.*, 289 U. S. 479;
Blair v. *Oesterlein Mach. Co.*, 275 U. S. 220; and
Webster Elec. Co. v. *Splitdorf Elec. Co.*, 264 U. S. 463.

Furthermore, questions which were not presented to the Circuit Court or determined by it are not open for consideration in the Supreme Court.

Sonzinsky v. *United States*, 300 U. S. 506;
Minnich v. *Gardner*, 292 U. S. 48;
Lynch v. *United States*, 292 U. S. 571;
Burnet v. *Commonwealth Improvement Co.*, 287 U. S. 415;
Husty v. *United States*, 282 U. S. 694;
Blair v. *Oesterlein Co.*, 275 U. S. 220, 225;
Pine River Logging & Improvement Co. v. *United States*, 186 U. S. 279.

As stated in *J. M. Robinson & Co.* v. *Belt*, 187 U. S. 41, the action of the lower courts —

> "should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases *de novo*."

Even if this were not the law, this Court could not consider the question, because, to determine when the action

accrued, certain ultimate facts, such as whether the liquidation was voluntary or otherwise, or whether a statutory receiver was appointed and whether he ever made an assessment, are necessary to be known. These facts are not in the record, because they were not deemed important at the trial, since the question of when the cause of action accrued was not in issue. The review of Circuit Court decisions is confined to matters properly presented in the record (see 12 *Cyc. Fed. Pro.*, 2d ed., p. 347). The Supreme Court will not consider questions of law when there is no assurance that the record contains all the evidence material to their decision (*Halbert* v. *United States*, 283 U. S. 753).

Further, this question cannot properly be raised in this Court, because it has already been decided against the petitioners in prior suits, and such previous determinations are *res judicata*. The Farm Loan Board had declared the Bank insolvent and in default on May 2, 1932, and appointed a statutory receiver on that day, as already observed. In the action commenced by the petitioners against the Bank and its stockholders in the Minnesota District Court in 1932 to have the Bank declared insolvent and to fix an assessment, it was held as a matter of law:

> "that each stockholder of the defendant * * * *was on May 2, 1932, and at all times since*, and is at the present time liable to the creditors of the defendant * * * in the amount of the par value of the shares of stock so held by him" (*Holmberg* v. *Southern Minnesota Joint Stock Land Bank*, 16 Fed. Supp. 795, 798). (Emphasis ours.)

In 1937 a creditors' bill was brought in New York by the same petitioners to enforce the statutory liability against such New York stockholders as had not previously satisfied the liability against them. In this action, in which Armbrecht was named but for some unaccountable reason never served, the Court held:

> "The cause of action accrued and the plaintiffs must be deemed to have been aware of their right to sue

stockholders at least by July 28, 1932, when they began their suit in Minnesota" (*Holmberg* v. *Anchell*, 24 Fed. Supp. 594, 691, aff'd 110 F. [2d] 1022 [C. C. A. 2]).

The holdings in both of the above cases were directed to contentions of the parties concerning laches and statutes of limitations, and so the holdings were material to those judgments.

It was said, in *Krauthoff* v. *Kansas City Joint Stock Land Bank*, 31 F. (2d) 75, 76, 77, that where in a prior action there is an identity of subject-matter and issues with the case at bar and the same plaintiffs are bringing the action against "substantially the same defendants", the decision in the prior case is *res judicata* as to the plaintiffs, apparently even though it would not be binding, under the rule of *Christopher* v. *Brusselback*, 302 U. S. 500, as to defendant-stockholders who were not parties to the prior action. It is established that a defendant, though not bound by an *adverse* holding in a prior case concerning the same subject-matter, can set up as a defense previous material determinations reached in the prior action in which the present plaintiffs were parties and had brought the action against parties standing in the same legal position as the present defendants (see *Good Health Dairy Products Corp.* v. *Emery*, 275 N. Y. 14; *cf. Elder* v. *New York & Penn. Motor Express Co.*, 284 N. Y. 350). The reason for this rule, of course, is that the present plaintiffs had a full opportunity to litigate the issue in the prior case.

Thus any one of several theories supports the conclusion that the question raised by the Trustees, as to when the cause of action accrues against the stockholders of a land bank, cannot be considered by this Court in the present case.

Moreover, could this Court consider the question, it would probably decide that the cause of action in cases of this nature accrues at or about the time when the bank is declared insolvent by the Farm Credit Administration. The action of this Court in *Russell* v. *Todd*, 309 U. S. 280,

aff'g 20 Fed. Supp. 930 (S. D. N. Y.), is indicative. In that case the district court had held that the cause of action of creditors of an insolvent joint stock land bank, to enforce the statutory liability of stockholders, accrued on the date when the administration by the receiver of the bank had proceeded far enough to enable him to know that the bank could not pay its debts in full (20 Fed. Supp. at 934). That date in the *Todd* case was April, 1928. The fact that the receiver appointed by the Farm Loan Board was not authorized to assess the stockholders was said to be irrelevant. The Supreme Court did not in any way question these rulings, but said:

> "The district court found, as is conceded here, that the cause of action accrued April 6, 1928, * * * and that the suit was commenced * * * on December 16, 1931 * * * (309 U. S. 284). The present suit was brought in less than four years after the cause of action had accrued * * *" (id., at p. 290).

Obviously the Supreme Court accepted the district court's ruling as to the time of the accrual of the cause of action as correct.

Furthermore, in every other case that we have found dealing with the question of when the cause of action accrues against the stockholders of a land bank, it has been held that the cause of action accrues either on the date the bank is declared insolvent and is placed in receivership, or at the very latest when it is manifest to the creditors that the bank is insolvent and they begin suit against the bank.

Ball v. *Gibbs*, 118 F. (2d) 958, 960 (C. C. A. 8);
Holmberg v. *Southern Minnesota Joint Stock Land Bank*, 10 Fed. Supp. 795, 798;
Holmberg v. *Anchell*, 24 Fed. Supp. 594, 601, aff'd 110 F. (2d) 1022;
Brusselback v. *Cago Corporation*, 24 Fed. Supp. 524, 532 (S. D. N. Y.);
In re Christopher's Estate, 35 N. E. (2d) 454, 459 (Ohio).

The petitioners and the Trustees have cited no cases to the contrary, and we do not believe any exist. In support of their argument that the cause of action should be deemed to accrue at the date of the levying of an assessment, which in the case of a land bank would not occur until a judicial assessment is made, the Trustees have cited only national bank cases. But the rule of these cases is not applicable to joint stock land bank cases. In fact, as we shall now show, the rule contended for by petitioners and the Trustees would result in there being no statute of limitations applicable to this type of action.

Superficially the cases involving the enforcement of the liability of stockholders of a national bank in voluntary liquidation present an attractive analogy to our situation, because the procedure prescribed in Section 65, Title 12, of the United States Code for enforcement of the liability of stockholders of a national bank in voluntary liquidation is somewhat similar to that initiated by *Wheeler* v. *Greene*, 280 U. S. 49, for the enforcement of the liability of stockholders of a joint stock land bank.[31]

However, there is at least one very important difference between the two procedures: Section 65 requires that the suit to determine and enforce the assessment of stockholders of a national bank must be brought only in "the district in which such association may have been located or established", and the assessment determined in such district court is binding even on non-resident stockholders not served in said suit (see *Hall* v. *Ballard*, 90 F. (2d) 939, 946-947—C. C. A. 4). On the other hand, in the case of stockholders of a land bank, *Wheeler* v. *Greene*, as amplified by *Christopher* v. *Brusselback*, 302 U. S. 500, allows the suit against stockholders of a land bank to be brought in any and all "neighborhood" courts where stockholders can

[31] Incidentally, this similarity of procedure is not due, as the Trustees would have it (Br., pp. 15, 16), to any identity of statute, but rather to the fact that *Wheeler* v. *Greene*, without referring to or relying on the procedure blocked out in Section 65, suggested a somewhat similar procedure on principles of general equity

be found, and the assessment levied in the original creditors' suit to have the bank declared insolvent and a receiver appointed by the federal court of the district where the bank is located is without extraterritorial effect and not binding on any stockholders not a party to such suit (see, also, *Holmberg* v. *Carr*, 86 F. (2d) 727—C. C. A. 2). Therefore, while only one assessment is made against all the stockholders and the date of its payment fixed in the case of the voluntary liquidation of a national bank, so that the cause of action against all the stockholders accrues on one certain day, theoretically the cause of action against each stockholder of a joint stock land bank could accrue on a different day as a separate assessment might be required as to every stockholder. As a matter of fact, since the determination of the amount of the assessment is prerequisite to the enforcement of the assessment against any stockholder (see *Christopher* v. *Brusselback, supra*, at 502-503), and since the prerequisite assessment must be made "in the very case in which the stockholders were being sued personally, not * * * in an earlier case against the bank" (*Partridge* v. *Ainley*, 24 Fed. Supp. 43, 44—S. D. N. Y.), it follows that there would be no enforceable liability against a stockholder until the very suit in which he is sued is commenced. There being no enforceable liability, there would be no cause of action; and if there is no cause of action, the appropriate statute of limitations could not begin to run. Thus, under the rule argued for by the Trustees, *the statute of limitations on a suit to enforce the assessment against a stockholder would not begin to run until the suit itself is commenced!* The statement bears the seed of its own destruction.

The Trustees contend, at page 22 of their brief, that the fact that the assessment in the original liquidation proceeding against the bank is not binding on stockholders not served in such suit, does not alter the general rule that the cause of action to recover the assessment, even against stockholders not served, accrues on the date of the determination of the assessment in the original liqui-

dation proceeding. This contention is untenable. It is obviously illogical to claim that the cause of action for the assessment accrued against Armbrecht and Bache when the amount of the assessment was determined in the original liquidation suit in Minnesota; such assessment had absolutely no bearing or effect on their liability. That is, Armbrecht and Bache were not liable for the amount of the assessment determined in the Minnesota suit. How then can it be argued that their liability for assessment accrued on the date of the Minnesota assessment?

Even the case of *Hall* v. *Ballard*, *supra*, at 945, relied on so heavily by the Trustees to support the proposition that the cause of action to enforce the liability for the assessment accrues on the date that a judicial determination of the assessment is made, recognizes that the cause of action to determine the amount of the assessment accrues upon the insolvency of the bank, or at least when the insolvency becomes manifest (as by the return of execution unsatisfied against the bank in the *Hall* case). In other words, the *Hall* case suggests that there are two causes of action: one to determine the amount of the assessment, and the other to enforce the assessment as determined.[32] Under this analysis the petitioners would still be vulnerable to the defense of the statute of limitations, for the suit to determine the amount of the assessment against Armbrecht and Bache was not commenced until 1943, although the insolvency had become manifest eleven years before, in 1932, when the Farm Loan Board declared it.

We submit that it is clear from the foregoing that if this Court could now consider this question the decision thereon would have to be in our favor.

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[32] But see *In re Christopher's Estate*, 35 N. E. (2d) 454, at 456 (Ohio).

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Dated: New York, January 26, 1946.

Respectfully submitted,

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